BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

LYLE STARR	)	
Claimant	)	
VS.	)	
	)	Docket Nos. 178,856 & 225,368
AMERICAN MAPLAN CORPORATION	)	
Respondent	)	
AND	)	
	)	
TRAVELERS INSURANCE COMPANY AND	)	
CHUBB & SON	)	
Insurance Carrier	)	

ORDER

Claimant appeals from an Order entered by Administrative Law Judge (ALJ) Bruce E. Moore on November 26, 1997.

ISSUES

Claimant appeals from the denial of his request for medical treatment. In Docket No. 178,856, claimant asks that the medical treatment be attributed to a compensable low-back injury of June 28, 1991. In Docket No. 225,368, claimant contends in the alternative that the medical treatment is necessary because of subsequent continuing aggravation from claimant's work activities for respondent. In both docketed cases, claimant has used the Preliminary Hearing Application (E-3) to bring the request before the ALJ. However, in Docket No. 178,856, claimant has also made a motion to set aside the settlement and reopen the case, contending the settlement was based on a mutual mistake of fact.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record and considering the arguments, the Appeals Board concludes that the decision to deny additional medical benefits should be affirmed.

In Docket No. 178,856, the Appeals Board has reviewed the Order as a final order subject to general de novo review under K.S.A. 1997 Supp. 44-551. In Docket No. 225,368, on the other end, the Appeals Board has reviewed the Order subject to its limited review authority for preliminary hearing orders. K.S.A. 1997 Supp. 44-551. The issue in Docket No. 225,368 is whether claimant's injury arose out of and in the course of his employment. That issue is subject to review as a jurisdictional issue. K.S.A. 1997 Supp. 44-534a.

DOCKET NO. 178,856

Claimant suffered injury to his back by accident arising out of and in the course of his employment with respondent on or about June 28, 1991. There is no dispute as to the compensability of this original accident. Dr. Robert L. Eyster diagnosed herniated discs at L3-4 and L4-5 and claimant was then referred to Dr. Michael P. Estivo. Dr. Estivo performed a partial laminectomy and diskectomy on August 5, 1992, and advised claimant that the surgery was performed at L4-5. Hospital records also state that the surgery was at L4-5. After the surgery, claimant sought a second opinion regarding the nature and extent of his permanent impairment from Dr. Daniel D. Zimmerman. Dr. Estivo had rated claimant's impairment at 10 percent of the body as a whole and Dr. Zimmerman rated claimant at 21 percent of the body as a whole.

On July 29, 1993, claimant settled his workers compensation claim at a settlement hearing before Special Administrative Law Judge David J. Wood. Judge Wood approved a lump sum settlement based upon a 15.5 percent permanent partial disability to the body as a whole. The settlement included a waiver of claimant's rights to seek further temporary total compensation and future medical compensation. The Special Administrative Law Judge advised the claimant that he was giving up his right to pursue the claim any further or have the case reopened for any reason. Claimant also acknowledged that he understood he was responsible for any bills incurred after that date.

Claimant's low-back complaints continued after the date of the settlement. Claimant cannot identify any specific event or activity that caused an increase in pain but testified that in March of 1997 his low-back pain had increased in severity and became virtually constant. Claimant sought additional medical care from his family physician, Dr. Richard L. Watson. Dr. Watson performed an MRI on April 2, 1997, and referred claimant to Estaquio O. Abay II, M.D., a neurosurgeon. Dr. Abay recommended surgery for a recurrent L4-5 disc herniation. On July 11, 1997, Dr. Abay performed an L4-5 partial laminectomy/diskectomy. From his observations during surgery, Dr. Abay concluded that the earlier surgery performed by Dr. Estivo had in fact been performed at L3-4 rather than L4-5.

Claimant now asserts that the settlement agreement was based upon mutual mistake of fact. Both he and the respondent believed that claimant had undergone surgery at L4-5 as recommended when in fact it was performed at L3-4.

The ALJ rejected claimant's assertion that the settlement was based upon a mutual material mistake of fact. The ALJ states the reason for his decision as follows:

> The Court is unable to accept Claimant's argument that there exists a mutual mistake of fact which would justify setting aside the 1993 settlement. While Claimant may have believed that he had surgery at L4,5, that specific surgical procedure was not mentioned in his correspondence with Respondent's insurance carrier as the sole basis for his agreement to settle for a lump sum. On the contrary, Claimant availed himself of his right to have a second opinion as to his functional impairment, at Respondent's expense, and negotiated a settlement of his claims based solely upon that functional impairment. The functional impairment was not expressly premised upon surgery at one particular level, but on the existence of a surgically treated lesion and resulting physical abilities as determined by work hardening and a functional capacities evaluation.

The Appeals Board agrees that the settlement agreement cannot be set aside but does so for other reasons. The ALJ concludes, in effect, that the mistake was not material. The Board does not agree. The position taken by the ALJ relates to the nature and extent of claimant's disability. Assuming, without deciding, that the location of the surgery was not relevant to the nature and extent of disability, the issue in this case is claimant's waiver of future medical treatment. It seems logical to assume the claimant might not have given up his rights to additional medical treatment had he understood or known that the surgery was not at the level he thought it was. The mistake of fact for that reason is considered by the Board to be a material mutual mistake of fact.

The Appeals Board, nevertheless, concludes that the settlement cannot be set aside. This conclusion is based upon the language of K.S.A. 44-528. A settlement agreement, once approved by the ALJ, becomes an award. A running award may be reviewed and modified. Redgate v. City of Wichita, 17 Kan. App. 2d 253, 836 P.2d 1205 (1992). The settlement issue here was, however, a lump sum settlement. K.S.A. 44-528 authorizes review and modification for a good cause shown including fraud, undue influence, or serious misconduct. K.S.A. 44-528 appears to provide the only method for modifying an award. The statute indicates a lump sum settlement may not be reviewed or modified. The statute provides no exception.

This reading of K.S.A. 44-528 is supported generally by Peterson v. Garvey Elevators, Inc., 252 Kan. 976, 850 P.2d 893 (1993). In that case, claimant attempted to set aside a settlement agreement on the grounds that his former counsel had failed to inform the ALJ fully of his traumatic epilepsy condition. The Court there applied and

construed K.S.A. 44-528 as prohibiting review and modification for a lump sum settlement. The opinion by the Court does hint at the possibility of an exception when it states as follows:

> It is important to understand that in this case Peterson does not claim fraud concerning the cause of his traumatic neurosis epilepsy. Prior to the settlement hearing in 1984, both the claimant and his then attorney knew of the head injury, knew that after the head injury claimant suffered from epilepsy, and knew that medical experts in the field attributed the epilepsy to the trauma suffered when the head injury occurred.

While this language may hint at a possible exception, the decision does not further explain what the exception is or the scope of the exception. No further explanation was, of course, necessary to the immediate case. The language of K.S.A. 44-528 reads as though there is no exception. The Workers Compensation Act is generally considered complete and exclusive within itself. Dinkel v. Graves Truck Line, Inc., 10 Kan. App. 2d 604, 706 P.2d 470 (1985).

Finally, the Appeals Board agrees with the decision by the ALJ that the settlement in this case was not precluded by the 1993 amendment to K.S.A. 44-531. In 1993, the legislature amended K.S.A. 44-531 to preclude lump sum settlements when the claimant is not receiving a work disability because he has returned to work at a comparable wage. The Board agrees with the conclusion that this is a substantive amendment and only applies to accidents which occur after July 1, 1993. State v. Sutherland, 248 Kan. 96, 804 P.2d 970 (1991). In addition, the Board notes, as did the ALJ, that claimant returned to work for respondent for more than two years before the current problems arose. The intent of the statute was, therefore, satisfied.

DOCKET NO. 225,368

As to claimant's contention that he has injured or aggravated his back by the work he has performed for respondent after the settlement of Docket No. 178,856, the Appeals Board concludes, as did the ALJ, that claimant has failed to meet his burden. As previously indicated, claimant cannot identify any specific event or activity that caused his injury. The only specific circumstances he described were those working at home on his driveway. In addition, Dr. Abay, in a letter to claimant's counsel of July 29, 1997, opines claimant's work activities after the 1992 surgery had not aggravated claimant's "pre-existing work condition." Dr. Abay attributes claimant's difficulties to "continued untreated L4-5 disc herniation."

WHEREFORE, the Appeals Board finds that the Order by Administrative Law Judge Bruce E. Moore, dated November 26, 1997, should be, and the same is hereby, affirmed.

IT IS SO ORDERED.

Dated this ____ day of February 1998.

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BOARD MEMBER

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BOARD MEMBER

_____
BOARD MEMBER

c: Joseph Seiwert, Wichita, KS
Kirby A. Vernon, Wichita, KS
Bruce E. Moore, Administrative Law Judge
Philip S. Harness, Director